*** THE HON'BLE Ms. JUSTICE G. ROHINI**

+ WRIT PETITION No.19861 OF 2005

% 15/11/2007

*M/s Ferro Alloys Corporation Limited,*
Represented by its Agent, Mining Division,
Sriramnagar, Garividi, Vizayanagaram District. .. Petitioner.

Vs.

$ *Union of India, represented by its Secretary,*
Ministry of Coal and Mines, Department of
Mines, Government of India, New Delhi and others. .. Respondents

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> Head Note:

! Counsel for the petitioner : Sri Ghanta Rama Rao

^ Counsel for the respondents 1 to 3 : G.P. for Mines & Geology
Counsel for the respondent No.4 : Smt. N. Shoba
Sri B. Ramnaresh Kumar

Cases referred :

[1] (1996) 6 SCC 702
2 AIR 1991 SC 818
3(1991) 3 SCC 428
4 2005 (1) ALD 369

THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.19861 OF 2005

15th November, 2007.

Between:
M/s Ferro Alloys Corporation Limited,
Represented by its Agent, Mining Division,
Sriramnagar, Garividi, Vizayanagaram District. .. Petitioner.

And

Union of India, represented by its Secretary,
Ministry of Coal and Mines, Department of
Mines, Government of India, New Delhi and others. .. Respondents

THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.19861 OF 2005

ORDER :

The writ petitioner is a Public Limited Company involved in production of Bulk Ferroy Alloy, for which purpose it requires large quantities of Manganese Ore.

Pursuant to the notification dated 25.1.2000 issued by the 2nd respondent under Rule 59(1)(a) of the Mineral Concession Rules, 1960 (for short, 'the Rules') notifying the area to an extent of 8.23 cents situated in Sy.Nos.71, 78, 79, 91/6, 81/2 to 6 of Kondapalem village for grant of mining lease (Manganese Ore), the petitioner-Company made an application on 16.6.2000. For the very same area, the 4th respondent herein also made an application on 27.5.2000. Having processed the applications received, the 2nd respondent vide memo dated 12.10.2001, while informing the petitioner that it's application was proposed for rejection on the ground that the area applied was fully overlapping with the applied area of the prior applicant i.e., 4th respondent called upon the petitioner to show cause as to why its application should not be rejected. The petitioner submitted a detailed representation dated 2.11.2001. However, by order dated 5.12.2001, the 2nd respondent rejected the mining lease application of the

petitioner. Under the same proceedings, the 4th respondent was provisionally granted the mining lease for a period of 20 years, subject to prior approval of the Government of India under Section 5(1) of the Mines and Minerals (Development and Regulation Act), 1957 (for short, "the Act"). Aggrieved by the same, the petitioner-Company filed a Revision Petition before the 1st respondent, which was dismissed by order dated 22.8.2005. Hence, this writ petition, seeking a *certiorari* to call for the records relating to the order of the 1st respondent dated 22.8.2005 as well as the order of the 2nd respondent dated 5.12.2001 and to quash the same being arbitrary and illegal.

In the counter-affidavit filed on behalf of respondents 2 and 3, it is stated that the mining lease application of the 4th respondent was recommended for grant of lease under Section 11(2) of the Act as their application was received earlier than the application of the writ petitioner. It is also stated that the petitioner did not fulfill the criteria laid down under sub-section (3) (1) to (d) of Section 11 of the Act and therefore, its application was rightly rejected.

A separate counter-affidavit has been filed by the 4th respondent stating that the petitioner cannot claim any priority as end user on the ground that the mine was in close proximity from its production unit. At any rate, since the petitioner submitted its application only on 16.6.2000, whereas the 4th respondent made its application much prior to it i.e., on 22.5.2000, the 4th respondent alone was entitled for grant of lease under the provisions of the Act and the Rules made thereunder, and therefore, the orders of the respondents 1 and 2 cannot be held to be arbitrary or illegal.

I have heard the learned counsel for both the parties and perused the material on record.

It is not in dispute that Manganese Ore is a mineral specified in Part-C of the 1st Schedule to the Act. As per sub-section (4) of Section 4 of the Act, no person shall undertake any mining operations

in any area except under and in accordance with the terms and conditions of a mining lease granted under the Act and the Rules made thereunder. Sub-section (2) of Section 4 of the Act further makes it clear that no mining lease shall be granted otherwise than in accordance with the provisions of the Act and the Rules made thereunder. Sub-section (1) of Section 5 of the Act provides that in respect of any mineral specified in the 1st Schedule to the Act, no mining lease shall be grated except with the previous approval of the Central Government. Section 10 of the Act, provides the procedure for making application for mining lease and Section 11 provides for preferential right of certain persons for obtaining a mining lease.

Having regard to the controversy involved, it is necessary to extract Section 11 of the Act, which runs as under:

11. Preferential right of certain persons:-

(1) Where a reconnaissance permit or prospecting licence has been granted in respect of any land, the permit holder or the licensee shall have a preferential right for obtaining a prospecting licence or mining lease, as the case may be, in respect of that land over any other person:

Provided that the State Government is satisfied that the permit holder or the licensee, as the case may be,--

(a) has undertaken reconnaissance operations or prospecting operations, as the case may be, to establish mineral resources in such land;

(b) has not committed any breach of the terms and conditions of the reconnaissance permit or the prospecting licence;

(c) has not become ineligible under the provisions of this Act; and

(d) has not failed to apply for grant of prospecting licence or mining lease, as the case may be, within three months after the expiry of reconnaissance permit or prospecting licence, as the case may be, or within such further period, as may be extended by the said Government.

(2) Subject to the provisions of sub-section (1), where the State Government has not notified in the Official Gazette the area for grant of reconnaissance permit or prospecting licence or mining lease, as the case may be, and two or more persons

have applied for a reconnaissance permit, prospecting licence or a mining lease in respect of any land in such area, the applicant whose application was received earlier, shall have the preferential right to be considered for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, over the applicant whose application was received later :

Provided that where an area is available for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, and the State Government has invited applications by notification in the Official Gazette for grant of such permit, licence or lease, all the applications received during the period specified in such notification and the applications, which had been received prior to the publication of such notification in respect of the lands within such area and had not been disposed of, shall be deemed to have been received on the same day for the purposes of assigning priority under this sub-section:

Provided further that where any such applications are received on the same day, the State Government, after taking into consideration the matter specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

(3) The matters referred to in sub-section (2) are the following..

(a) any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be, possessed by the applicant;

(b) the financial resources of the applicant;

(c) the nature and quality of the technical staff employed or to be employed by the applicant;

(d) the investment which the applicant proposes to make in the mines and in the industry based o the minerals;

(e) such other matters as may be prescribed;

(4) Subject to the provisions of sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified

in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

(5) Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an application whose application was received earlier.

……"

On a plain reading of the above provision, it is clear that whereas sub-section (2) of Section 11 deals with areas which are not notified by the State Government in the Official Gazette for grant of a mining lease, sub-section (4) of Section 11 provides the procedure to be followed where the State Government notified an area in the Official Gazette for grant of a mining lease. It is apparent that though sub-section (2) provided a preferential right in favour of a prior applicant, no such preference is available under sub-section (4) to a prior applicant over an applicant who made his application at a later point of time. On the other hand, sub-section (4) expressly provided that all applications shall be considered simultaneously as if they are received on the same day, provided they are received during the period specified in the notification.

In the case on hand, it is true that the petitioner made its application on 16.6.2000, whereas the 4th respondent's application was received on 27.5.2000. However, since, admittedly, the area in question was notified in the Official Gazette under Rule 59(1)(a) of the Rules, sub-section (4) is attracted and, consequently, all the applications received during the period specified in the notification have to considered simultaneously as if all such applications have been received on the same day taking into consideration the matters specified in sub-section (3) of Section 11 of the Act.

However, a perusal of the show cause notice dated 12.10.2001

itself shows that the petitioner's application was proposed for rejection on the ground that the area applied was fully overlapping with the area applied for by the prior applicant viz., the 4th respondent.

In the impugned order dated 5.12.2001, the same reason was reiterated and it was concluded that since the petitioner's application was a subsequent application and since there were no special reasons for overlooking the prior applicant, it was decided to reject petitioner's application and grant mining lease in favour of the 4th respondent.

Even the 1st respondent, while dismissing petitioner's Revision, proceeded on an erroneous assumption that the principle of first come first served has to be followed for grant of a mining lease under the Scheme of the Act. The relevant portions from the order of the 1st respondent dated 22.8.2005 may be extracted hereunder.

> "……
>
> (12) In this case it is undisputed that the petitioner has applied for grant of mining lease on 16.6.2000 while the impleaded party had applied for grant of mining lease on 27.5.2000. Hence, the impleaded party was the prior applicant for the applied area.
>
> (13) Under the existing scheme of the Mines and Minerals (Development and Regulation) Act, Mines and Minerals (Development & Regulation) Act, 1957 (for short, 'MM(D&R) Act'). (hereinafter referred to as the Act), the principle of "first come first served" has to be followed in the normal course while granting ML. The principle can be put on hold and priority can be assigned to a later applicant for reasons to be recorded in writing by the State Government.
>
> (14) In the instant case, the State Government vide the impugned order has decided that the impleaded party, which is also the prior applicant, has better credentials for grant of mining lease over the applied area and the State Government has not deemed it appropriate to invoke the powers under Section 11(5) of the Act and granted mining lease to the petitioner. The State Government is owner of the minerals and the State Government has to take a view whether it wants to invoke its power under Section 11(5) of the Act to accord priority to a later applicant in the interest of mineral development. In the instant case, the State Government has chosen not to exercise its powers under Section 11(5) of the Act and has instead decided to grant mining lease to the impleaded party who in the Judgment of the State

Government has a better claim for grant of mining lease and who is also the prior applicant. The State Government taken into consideration all factors including the financial position of the petitioner's firm and the Labour and BIFR status at that time. Considering all these facts, the petitioner's ML application was rejected. The State Government also of the opinion that grade of manganese ore found I the area was not suitable for use by the petitioner in its plant. We, therefore, see no legal infirmity in the stand taken by the State Government in passing the impugned order. The revision application is accordingly dismissed."

From the above, though it appears that the 1st respondent has considered the financial position of the petitioner as well as the suitability of the Manganese found in the area for use by the petitioner in its plant, it is clear that the 1st respondent has proceeded only on an assumption that the fourth respondent, being a prior applicant, is entitled for a preferential right and except for special reasons to be recorded in writing, the petitioner, whose application was received later, cannot be granted the mining lease.

It is to be noted that there was an amendment to Section 11 of the Act by Amendment Act No.38 of 1999 w.e.f. 20.12.1999. By virtue of the said amendment, a distinction has been drawn between the areas notified for grant of mining lease and those areas which are not notified for grant of mining lease. Whereas under Section 11 as it stood prior to the amendment the principle of first-cum-first-served was existing for the purpose of grant of mining lease in respect of any area, there has been a departure in the said principle under the amended provision so far as the areas notified for grant of lease are concerned.

For better appreciation, it would be necessary to notice Section 11 of the Act as it stood prior to Amendment Act No.38 of 1999 w.e.f. 20.12.1999.

11. Preferential right of certain persons:-

(6) Where a prospecting licence has been granted in respect of any land, the licensee shall have a preferential right for obtaining a mining lease in respect of that land over any other person:

Provided that the State Government is satisfied that the licensee--

(a) has undertaken prospecting operations to establish mineral resources in such land;

(b) has not committed any breach of the terms and conditions of the prospecting licence; and

(c) is otherwise a fit person for being granted the mining lease

(2) Subject to the provisions of sub-section (1), where two or more persons have applied for a prospecting licence or a mining lease in respect of the same land, the applicant whose application was received earlier shall have the preferential right for grant of the licence or lease, as the case may be, over an applicant whose application was received later :

Provided that where any such applications are received on the same day, the State Government, after taking into consideration the matters specified in sub-section (3), may grant the prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

(3) The matters referred to in sub-section (2) are the following..

a. any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be, possessed by the applicant;

b. the financial resources of the applicant;

c. the nature and quality of the technical staff employed or to be employed by the applicant;

d. such other matters as may be prescribed;

(4) Notwithstanding anything contained in sub-section (2) but subject to the provisions of sub-section (1), the State Government may for any special reasons to be recorded and with the previous approval of the Central Government, grant a prospecting licence or a mining lease to an applicant whose application was received later in preference to an applicant whose application was received earlier."

As could be seen, under Section 11 of the Act as is stood prior to the amendment, where two or more persons have applied for a mining lease in respect of the same area, the applicant whose application was received earlier shall have a preferential right for grant

of mining lease. Thus, the principle of first come first served alone was existing under the Scheme of the Act. However under sub-section (4) of Section 11 of the Act, as amended, which is applicable to the areas notified in the Official Gazette for grant of a mining lease, the date of application has no relevancy at all. The said provision makes it clear that all the applications received during the period specified in the notification shall be considered simultaneously as if all such applications have been received on the same day taking into consideration the matters specified in sub-section (3). Thus, so far as the areas notified in the Official Gazette for grant of mining lease are concerned, there cannot be any preference to a prior applicant.

It is also relevant to note that sub-section (4) of Section 11 of the Act, as it stood prior to amendment which empowered the State Government to dispense with the preference provided to a prior applicant has been reproduced as sub-section (5) with certain modifications under Amendment Act No.38 of 1999.

In the case on hand, admittedly the area in question was notified in the Official Gazette under Rule 59 (1)(a) of the Rules. It is also not in dispute that the said notification was published on 25.1.2000 after the enforcement of the Amendment Act No.38 of 1999. In the circumstances, the respondents 1 to 3 are bound to follow the procedure prescribed under sub-section (4) of Section 11 of the Act as amended by Act No.38 of 1999 by considering all the applications received during the period specified in the notification simultaneously taking into consideration the relative merits as provided under sub-section (3) of the Act.

Apparently, the 2nd respondent failed to notice the effect of Amendment Act 38 of 1999, which was already in force by the date of notification dated 25.1.2000 and considered the applications of the petitioner and the 4th respondent on the principle of first come first served. Even the 1st respondent while dismissing the Revision Petition proceeded on the basis of Section 11 of the Act, as it stood

prior to the Amendment Act 38 of 1999 and concluded that the State Government did not commit any error in declining to invoke the power for dispensing with the preferential right conferred on the prior applicant.

Thus, the orders of the 2nd respondent as well as the 1st respondent, suffered from an apparent legal infirmity. Both the authorities failed to assess the relative merits of the petitioner and the 4th respondent taking into consideration the matters specified in sub-section (3) of Section 11 of the Act. Therefore, the said orders are liable to be set aside on that ground alone.

The decisions cited by the learned Counsel for the 4th respondent in DHARAMBIR SINGH v. UNION OF INDIA[1], INDIAN METALS & FERRO ALLOYS LTD. v. UNION OF INDIA[2] and HINDUSTAN ALUMINIUM CORPN. LTD. v. STATE OF BIHAR[3] in which the Supreme Court was dealing with Section 11 of the Act as it stood prior to amendment have no application for deciding the controversy involved in the instant case. Even the decision of this Court in GIMPEX LTD., CHENNAI v. J. ASHOK KUMAR AND OTHERS[4] is clearly distinguishable on facts and therefore has no application.

Accordingly, the order of the 2nd respondent dated 5.12.2001, as confirmed by the 1st respondent by order dated 22.8.2005, is hereby set aside and the writ petition is allowed with a direction to the 2nd respondent to reconsider all the applications received during the period specified in the notification dated 25.1.2000, in terms of sub-section (4) of Section 11 of the Act, and pass appropriate orders in accordance with law. No costs.

15.11.2007.

Kgr

Note:- LR copy to be marked.

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[1] (1996) 6 SCC 702
[2] AIR 1991 SC 818
[3] (1991) 3 SCC 428
[4] 2005 (1) ALD 369